



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

August 1, 1996

Mr. Dennis J. Eichelbaum  
Schwartz & Eichelbaum, P.C.  
General Counsel  
Dallas Independent School District  
3700 Ross Avenue, Box 69  
Dallas, Texas 75204-5491

OR96-1368

Dear Mr. Eichelbaum:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 40587.

The Dallas Independent School District (the "school district") received a request for the depositions of Michael Stiles and Zulema Ortiz "taken during the internal investigation of grade and attendance fraud at Sunset High School in March of 1995 by Mr. Robbie Collins." You submitted a copy of the requested information to this office and claim that it is excepted from disclosure under sections 552.103(a)(1) and (2) of the Government Code. We have considered the exception you claimed and have reviewed the documents at issue.

Section 552.103(a) excepts from required public disclosure information:

- (1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and,
- (2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

The school district has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for

meeting this burden is a showing that (1) litigation is pending or reasonably anticipated and (2) the information at issue is related to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 (1990) at 4. The school district must meet both prongs of this test for information to be excepted under section 552.103(a).

You assert that the submitted depositions are excepted from required public disclosure under section 552.103 of the Government Code based on a lawsuit styled *Parker, et al. v. Dallas Independent School District, et al.*, Cause No. 95-7133G. The lawsuit appears to allege libel, among other claims. You assert that section 552.103 applies to the submitted records, because the information sought by the requestor relates to the litigation in which the school district is a party, as evidenced by the petition. We have examined the information and documents submitted to us for review. In this instance, the school district has established that litigation is pending and that the deposition transcripts are related to that pending litigation. However, when all opposing parties in the litigation have seen or had access to any of the information in these records, there is no justification for withholding that information from the requestor pursuant to section 552.103(a). Open Records Decision Nos. 349 (1982), 320 (1982). Since it appears that the depositions have been seen by the opposing party, the school district may not withhold the depositions under section 552.103(a); therefore, you may not rely on section 552.103 to withhold the depositions from the requestor.<sup>1</sup>

Although you have not raised section 552.101 as an applicable exception to the information revealed in the depositions, upon reviewing the depositions, some of the information may be confidential by law.<sup>2</sup> The Office of the Attorney General will raise section 552.101 on behalf of a governmental body when necessary to protect third-party interests. Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987). The school district should review the depositions and redact any information which is confidential. Moreover, we caution that section 552.353 of the Open Records Act imposes criminal penalties for the release of confidential information.

Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision. Section 552.101 encompasses common-law privacy and excepts from disclosure private facts

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<sup>1</sup>In addition, it appears that these depositions have been released to the public, albeit not necessarily by the school district. A governmental body who voluntarily releases information to one person must make that information available to any other person who makes a request. Gov't Code §552.007. If the school district was involved with the release of some or all of this information to the Dallas Observer, or to any other person, then the school district has waived any exceptions under the Open Records Act with respect to that information, unless the information is confidential by law. Open Records Decision No. 490 (1988).

<sup>2</sup>Even if the school district has waived its exceptions as a result of "selective disclosure" of the requested information, information deemed confidential by law may not be waived. Open Records Decision Nos. 490 (1988), 463 (1987).

about an individual. *Industrial Found. of the South v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Information may be withheld from the public under the doctrine of common-law privacy when (1) it is highly intimate and embarrassing such that its release would be highly objectionable to a person of ordinary sensibilities and (2) there is no legitimate public interest in its disclosure. *Id.* at 685; Open Records Decision No. 611 (1992) at 1. The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* includes information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683.

Section 552.101 also excepts information that is confidential under constitutional privacy. Constitutional privacy consists of two interrelated types of privacy: (1) the right to make certain kinds of decisions independently and (2) an individual's interest in avoiding disclosure of personal matters. Open Records Decisions Nos. 455 (1987) at 4, No. 600 (1992) at 4 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)). The first is the interest in independence in making certain important decisions related to the "zones of privacy" recognized by the United States Supreme Court. Open Records Decision No. 600 (1992) at 4. The zones of privacy recognized by the United States Supreme Court are matters pertaining to marriage, procreation, contraception, family relationships, and child rearing and education. *Id.*

The second interest is the interest in avoiding disclosure of personal matters. The test for whether information may be publicly disclosed without violating constitutional privacy rights involves a balancing of the individual's privacy interests against the public's need to know information of public concern. See Open Records Decision No. 455 (1987) at 5-7 (citing *Fadjo v. Coon*, 633 F.2d 1172, 1176 (5th Cir. 1981)). The scope of information considered private under the constitutional doctrine is far narrower than that under the common law; the material must concern the "most intimate aspects of human affairs." See Open Records Decision No. 455 (1987) at 5 (citing *Ramie v. City of Hedwig Village*, 765 F.2d 490, 492 (5th Cir. 1985), *cert. denied*, 474 U.S. 1062 (1986)).

We do not believe that the depositions as a whole are the kind of information which is protected by a right of privacy. Notwithstanding our finding that the depositions are not protected by a right to privacy in their entirety, there may be portions of the depositions which are protected by privacy and must be withheld. For your convenience, we have included for your review a sampling of common types of information deemed confidential.

In addition, it is possible that some of the information disclosed during the depositions may be confidential under section 552.117 of the Government Code. Therefore, this specific information, depending on the specific circumstances, must not be released. Section 552.117 of the Government Code excepts from required public disclosure the home addresses, telephone numbers, social security numbers, or information

revealing whether a public official has family members of public employees who request that this information be kept confidential under section 552.024. Therefore, section 552.117 requires you to withhold the information of a current or former official who requested that this information be kept confidential under section 552.024. See Open Records Decision Nos. 622 (1994), 455 (1987). You may not, however, withhold the information of a current or former employee or official who made the request for confidentiality under section 552.024 after this request for information was made. Whether a particular piece of information is public must be determined at the time the request for it is made. Open Records Decision No. 530 (1989) at 5. We have marked a sample of the kind of information that must be withheld if the official made the election not to allow public access to the information.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink that reads "Sam Haddad". The signature is fluid and cursive, with the first name "Sam" being more prominent than the last name "Haddad".

Sam Haddad  
Assistant Attorney General  
Open Records Division

SH/ch

Ref.: ID# 40587

Enclosures: Submitted documents  
List of Confidential Information

cc: Ms. Leticia Mata  
222 N. Barnett  
Dallas, Texas 75211  
(w/o enclosures)